No. 616



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

---

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY AND WARREN C. SCHWARTZ, TRUSTEE IN BANKRUPTCY OF A & S ELECTRIC CORP.,
*Petitioners*

*v.*

UNITED STATES OF AMERICA

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

**BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE**

---

J. Albert Woll
*General Counsel, AFL-CIO*
Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N. W.
Washington, D. C. 20005

Thomas E. Harris
*Associate General Counsel, AFL-CIO*
815 Sixteenth Street, N. W.
Washington, D. C. 20006

# INDEX



## Citations

Cases:

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

---

No. 616

---

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY AND WARREN C. SCHWARTZ, TRUSTEE IN BANKRUPTCY OF A & S ELECTRIC CORP.,

*Petitioners*

*v.*

UNITED STATES OF AMERICA

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

---

This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organization (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

## INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred and twenty-nine affiliated national and international labor unions having a total membership of approximately fourteen million workers. These unions have been at the forefront of the efforts to provide workingmen and women adequate pension and welfare benefits. Thus, the latest government figures available indicate that in 1960 78% of the employees covered by collective bargaining agreements were covered by health and insurance plans and 60% by pension plans.

Since the comparable figures in 1950 were 47% and 34% the number of employees covered by such collectively bargained benefits today is undoubtedly higher, *see* Department of Labor, Bureau of Labor Statistics Report No. 228, Health and Insurance and Pension Plan Coverage in Union Contracts 1960.

This Court's decision in *Embassy Restaurant, Inc.* v. *United States*, 359 U.S. 29 (1959), over the dissent of Mr. Justice Black, the Chief Justice and Mr. Justice Douglas, which denies the wage priority provided in §64(a) (2) of the Bankruptcy Act, 11 U.S.C. §104(a) (2), to claims for monies due to finance welfare benefits has created substantial problems for unions in their efforts to provide secure welfare benefits. The decision of the court below (R. 6-10) which extends *Embassy Restaurant* to claims for monies due to finance annuities for workers compounds these problems. For many of the covered workers are employed by small marginal employers. Too often these marginal operators suffer the pangs of financial distress and teeter on the verge of bankruptcy. As a result, experience indicates that payments to pension and welfare plans may well become delinquent. The plans in question, of course, make every effort to collect the payments due. Yet, as a practical matter, there are times when a crucial determination must be made; whether it is absolutely necessary to cancel welfare policies of covered employees or lower their pension benefits when an employer has failed to keep current with contributions to a fund, and for that matter, to press for delinquent payments with the possibility of the employer actually going out of business; or, to allow a reasonable amount of leeway with the hope that it will allow him to continue in business and thus maintain the jobs of his employees, not to speak of making good upon his obligations to the plan. This is not an easy determination to make. In those instances where such leeway is given, the employees involved are usually not deprived of the medical and hospital insurance or pension credits so vital to them and their families, and where the employer does survive,

his payments are brought back to a current status. Unfortunately, where such a delinquent employer does not survive, then not only are the jobs of the workers lost, but under the current interpretation of §64 (a)(2), the delinquent payments to the plan are often lost as a practical matter. This occurs because these payments are not entitled to any other priority, and the priority debts may be sufficient in amount to exhaust the balance of the bankrupt's estate, leaving nothing for non-priority claims. Because of these practical considerations and because of our firm belief that the majority opinion in *Embassy Restaurant* is an unwarranted departure from earlier authority, and is unsound in its reasoning, the AFL-CIO wishes to take this opportunity to urge this Court to adopt the soundly reasoned opinion of the dissenters in that case.

## ARGUMENT

### WHEN AN EMPLOYER OBLIGATES HIMSELF IN A COLLECTIVE BARGAINING AGREEMENT TO MAKE PAYMENTS TO A WELFARE OR PENSION PLAN COVERING HIS WORKMEN A CLAIM FOR UNPAID MONIES DUE SHOULD BE ACCORDED THE WAGE PRIORITY IN THE BANKRUPTCY ACT

§64(a) (2) of the Bankruptcy Act, 11 U.S.C. §104(a)(2) provides that "wages . . . due to workmen" are entitled to a priority in bankruptcy. In the instant case an employer obligated himself, in a collective bargaining agreement, to pay certain monies to a plan which covered his employees and provided them with annuities. He had not fulfilled that obligation in its entirety at the time he went into bankruptcy and the question presented here is whether the wage priority is applicable to a claim for that unpaid balance due. In *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29 (1959) this Court dealt with the related question of whether a claim for the unpaid obligation to a welfare fund, which provided life insurance coverage, sick benefits, and hospital and surgical benefits for

the workers it covered, was entitled to the wage priority. The Court held, over the dissent of Mr. Justice Black, who was joined by the Chief Justice and Mr. Justice Douglas, that the wage priority did not apply. The Petitioners, in their brief in the instant case, have shown that the reasoning of the majority in *Embassy Restaurant* is inapplicable to the claim asserted here, and to claims for unpaid obligations to pension plans generally. We are in complete accord with the points made in that brief and we incorporate them by reference. In addition, with all deference, we further submit that both the reasoning of, and the result reached by, the majority in *Embassy Restaurant* are unsound, that the opinion constitutes a unwarranted departure from prior authority, and the approach taken by the dissenters in that case is entirely correct. We, therefore urge the Court to take the opportunity provided by the instant case not simply to reach the right result here, though that of course is important in itself, but also to clarify the law governing this general area by adopting the soundly reasoned position of the dissenters in *Embassy Restaurant*. Because it is our view that the dissenters in that case have already stated the basic principles which should apply here, we will restrict our argument first to showing why both the realities of collective bargaining and an equitable approach to the wage priority support their view, and second to an attempt to demonstrate the defects in the majority approach.

1. *The Opinion Of The Dissenters In Embassy Restaurant States The Correct Governing Rule Of Law.* The basic point made by Mr. Justice Black in his dissent in *Embassy Restaurant* was (359 U.S. at 37-38):

> "Courts have long held that compensation for services rendered is a valid definition of 'wages' both in the priority section of the Bankruptcy Act and in other contexts. This is certainly in accord with the customary meaning of the word. It appears, moreover, that unions and employees consider such payments as the equivalent of wages and that they have been treated as wages in other statutes. In fact, where such treatment has

seemed undesirable, Congress has expressly excluded them from the category." (footnotes omitted)

In sum, the term "wages" should be held to include every obligation an employer assumes in a collective bargaining agreement which requires him to make payments to his employees directly, or to their designee. The realities of collective bargaining as it has evolved under the national labor policy provide compelling support for this definition of wages. That policy provides for "collective bargaining with the right to strike at its core" *Motor Coach Employees* v. *Missouri,* 374 U.S. 74, 82 (1963) as to any matter which constitutes a mandatory subject of bargaining, *see National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.,* 356 U.S. 342 (1958). Regular cash payments, deferred payments for pensions, vacation pay, sick pay, etc., payments to purchase health and welfare benefits all constitute mandatory subjects of bargaining, *see e.g. Inland Steel Co.* v. *National Labor Relations Board,* 170 F.2d 247, 251 (7th Cir., 1948), *certiorari denied on this point* 336 U.S. 960. Employees thus have a right to engage in a collective refusal to work if an unsettled dispute as to the amount of any of these payments exist. Therefore, when the quantum of these payments is settled the only realistic assessment of the settlement is that the total amount of the employees' compensation for their labor has been fixed. In other words the agreement provides that their labor is to be exchanged for the employer's promise to pay them, or their designees, the agreed upon sums of money.

Because of the fact that employees have the equal right, and equal power, to demand payment in any one of the forms just noted, it is common for unions to regard all of them as components of a single overall aggregate—the wage package. And, union demands are generally formulated on the basis of such an overall package. At different times depending on the prior history of negotiations, the evolving character of the work force, the state of the economy generally, and the nature of other settlements, increases in different components of the package

may be emphasized. In an inflationary period, for example, increases in cash wages may be stressed. Where the work force is comprised of a high proportion of older employees, increases in employer contributions to the pension fund may be given first priority. Moreover, depending on the desires of the membership, a tentative decision to press for an increase in cash wages may be traded off for an increase in vacation pay, or pensions, or vice versa. The variations are literally endless, but the theme is, we believe, clear enough without spelling them out in detail. Moreover, looked at from the employer's point of view, it is equally plain that the aggregate payment he obligates himself to make is his dominant consideration. For his primary focus is on his labor cost per unit of production and a dollar paid to a welfare fund adds to labor costs just as a dollar paid in cash wages does. In a resolution urging repeal of *Embassy Restaurant* the delegates to the AFL-CIO's Fourth Constitutional Convention, held in December 1961, summarized their extensive experience as to the nature of collective bargaining as follows:

> "Welfare and pension funds financed by employer contributions have expanded in number and scope with an almost explosive force, and workers, unions, employers, Congress and recognized authorities have universally agreed that such contributions are equivalent to wages paid in ready cash. To the employer, such payments represents a direct "labor cost" of his doing business just as real as the hourly piece rate or other fringe benefits which have been held to constitute "wages" under the Bankruptcy Act, and to the worker such payments represent part of his pay which serve to provide him, and in many instances, his dependents, with insurance protection when confronted with illness, and security in old age, and, as such, these payments are a form of compensation just as real as the monies received in the weekly pay envelopes."

The soundness of this description of the realities of collective bargaining has received governmental recognition in the formulation of the so-called price-wage guideposts. For example, in the 1964 Economic Report of the President

(G.P.O. 1964), the guidepost concept was stated as follows (p. 118):

> "The guideposts contain two key propositions. The first—the general guidepost for wages—says that, in a particular firm or industry, the *appropriate noninflationary standard for annual percentage increases in total employee compensation per man-hour (not just in straight-time hourly rates)* is the annual increase in national trend output per man-hour." Emphasis added, *see also* 1967 Economic Report of the President, p. 121 (G.P.O. 1967).

In addition, further support for the proposition that contributions to welfare and pension plans and cash wages are interchangeable portions ~~for~~ of a single wage package is available from a variety of sources. The following few examples should, we believe, more than suffice for our purpose here. Arthur J. Goldberg, then General Counsel of the C.I.O., and an experienced negotiator, put the essential point as follows in a 1955 statement:

> "The union and management come to the bargaining table with some appraisal of how much money there is in the 'kitty' for an increase. The appraisals are, naturally, different. But it is the total cost of improvements which provides the framework within which the union and management bargain. If the 5 cents, for example, does not go into a health fund, it can go into a wage increase or two extra holidays or double time for overtime on Saturdays. This is what collective bargaining is all about. "Harbrecht, Pension Funds and Economic Power, 39 (1959). *See also* Johnson, *Ford Supplemental Unemployment Benefit Plan"* (Machine and Allied Products Institute). Financial Review 1, 3 (1957) for a statement reflecting the same views by a management spokesman.

It has also been stressed in arbitration decisions. In *Rock Products Employees of Southern California*, 29 L.A. 101, 122 (1957), the arbitrator stated:

> "In the opinion of the Arbitrator the Employers' contribution to the pension program is, in effect, a de-

> ferred wage increase and therefore the money involved is the Employees', conceded to them in collective bargaining negotiations in the same category as wages or any other economic benefit." *See also, Pittsburgh Ry. Co.,* 33 L.A. 862, 866 (1959).

Finally, numerous bargaining settlements explicitly evidence the wage package approach. The 1959 Steel agreements provided for specified cents per hour wage increases at the agreements's anniversary date, but also provided that if by that time pension plan costs had increased, the amount of the increase would be deducted from the scheduled wage increase, 45 L.R.R.M. 12, 13 (1959). And when General Motors and the UAW reached a contract settlement in 1961, they announced that a portion of a cost-of-living wage increase which was scheduled to occur just prior to the new agreement would be applied "toward payment of increased pensions." 48 L.R.R.M. 25, 26 (1961).

In *Embassy Restaurant,* Mr. Justice Black dealt with the construction of the remaining relevent phrase in §64(a) (2) —"due to workmen"—in the following manner (359 U.S. at 39-40):

> "In Shropshire [Woodliff & Co. v. Bush, 204 U.S. 186], the Court said, 'The priority is attached to the debt and not to the person of the creditor; to the claim and not to the claimant. The act does not enumerate classes of creditors and confer upon them the privilege of priority in payment, but, on the other hand, enumerates classes of debts as 'the debts to have priority.' 204 U.S. at 189. It then held that an assignee of a worker had priority since the debt was wages due to workmen.
>
> "Even if it could be meaningfully argued that in Shropshire the money was at one time due to workmen, and therefore remained so after assignment, while here it never was due to them, we are, I think, precluded from that position unless we depart from the reasoning of United States for benefit of Sherman v. Carter, 353 U.S. 210. That case construed §2(a) of the Miller Act, 49 Stat 794, 40 USC §270b (a), which provides that 'Every person who has furnished labor . . . and who has not been paid in full . . . shall have the right to

sue on [a] payment bond . . . for the sum or sums justly due him.' The Court held that, for the purposes of the Miller Act, payments to welfare funds are, 'as much "justly due" to the employees who have earned them as are the wages payable directly to them in cash.' 353 U.S. 220. In fact, the Court stated that trustees of the welfare fund have an even better right to sue than most assignees since the trustees, unlike the usual assignee, sue for the benefit of the workers. Ibid."

This portion of the dissenters' position also finds a firm foundation in the basic nature of the dynamics of collective bargaining. The fact that workers can strike to compel payments to their designee, as well as direct payments to themselves, demonstrates that all the obligations assumed by the employer in the collective agreement are in reality obligations owned to them and that beneficial enjoyment of the monies paid to a pension or welfare plan is to be confined to the covered employees. The nominal title holder to those funds cannot use them for any other purpose. This restriction on beneficial ~~employment~~ enjoyment of the funds paid into a plan is enforced by federal law. Thus, if the plan is one which requires payments to a trust jointly administered by labor and management, § 302 of the Labor Management Relations Act of 1947 29 U.S.C. § 186, provides that:

> "(A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance;
>
> * * * *
>
> "and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

Moreover, if the plan in question is to be one qualified for favored tax treatment, Section 401(a) of the Internal Revenue Code, 26 U.S.C. § 401(a) requires that:

> ". . . under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries.
>
> * * * *
>
> "A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, upon its termination or upon complete discontinuance of contributions under the plan, the rights of all employees to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the amounts credited to the employees' accounts are nonforfeitable."

It is, therefore, perfectly plain that both the genesis of the obligation to pay monies into pension and welfare plans, and the legal limitations placed on the distribution of those funds, establish that those payments are "due to workmen". The creation of separate pension and welfare plans from which to pay these benefits as they become due and the appointment of trustees to manage them should not be allowed to obscure this point for these developments are designed to emphasize the point that the monies in question are for the *sole beneficial enjoyment of the workmen who provide their labor in exchange for these payments.* And these protective devices are encouraged by federal law to insure the safety of the accumulated monies so that the legitimate expectation of the workers who order their affairs in reliance upon the existence of these plans will not be disappointed.

Indeed, any attempt to differentiate the treatment which claims for different portions of the wage package receive in bankruptcy leads to inequitable treatment for different groups of workmen. For there is no dispute over the point

that if employees choose to seek only cash wages paid directly to them the unpaid moneys owing are "due to workmen". The same result follows if workmen choose to take a portion of their compensation as vacation pay, or severance pay paid directly to them, *United States* v. *Munro-Van Helms Co.,* 243 F.2d 10 (5th Cir., 1957). In addition, if they choose to have a portion of their compensation paid into a trusteed plan which distributes vacation pay, the moneys payable to that plan are also regarded as "wages . . . due to workmen." *Sulmeyer* v. *Southern California Pipe Trades Trust Fund,* 301 F.2d 768 (9th Cir., 1962). Moreover, employees are also free to bargain for a wage package which leaves the employer free to pay pension benefits directly to his workmen if he chooses to do so despite the tax consequences of that choice. For example, the Collective Agreement between the United States Steel Corporation and the United Steelworkers of America leaves the administration of the Pension Plan to the Company, Section 9.1, CCH Pension Plan Guide p. 31, 315, ¶ 43,777 and states that the Company "may establish . . . a pension trust . . . for the purpose of supplying the pension benefits herein provided." Section 7.1, *Ibid* at p. 31, 315, ¶ 43,775. Thus, so far as the workers covered by that plan are concerned, the Company is free to pay them the benefits due directly. To say that the obligation a company thus assumes in the instances just noted is one "due to workmen" but that the obligation is not "due to workmen" if it is to finance pension or welfare benefits and if it is paid to a trust or some other form of special fund appears to us to exalt form over substance. For we can conceive of no reason of policy for saying that employees who take any one of these different choices of allocating their compensation should be in a different substantive position from those who have chosen a different method.

2. *The Reasoning Of The Majority Opinion In Embassy Restaurant Is Unsound And Should Not Be Followed.* The majority's opinion in *Embassy Restaurant* has three basic components. In the first (359 U.S. at 33) the majority di-

rected its attention to ascertaining whether the obligation to make contributions to the welfare fund there possessed the customary attributes of "wages . . . due to workmen" and evidentally concluded that these customary attributes are that the payments have "a relation to hours, wages and production", that if the payment is made to a fund the workmen must have a "legal interest in the fund . . . to compel payment", that the payment must be labelled wages and not contributions, and that the obligations must run directly to workmen in the first instance and not to trustees who enjoy "sole title . . . and the exclusive management of the funds".

We respectfully submit that there are several errors in this analysis. The most critical of these is that the entire discussion on this point focuses on surface characteristics rather than on the matrix upon which the obligation in question is based, and the purpose to which the funds are dedicated. For example, the conclusion that in a particular instance the contributions in question are not based on hours worked, a percentage of hourly wages, or on productivity is not a point which serves to distinguish the contributions from payments of cash wages. One of the basic bargaining demands of various unions has been that cash wages should not be rigidly tied to hours or productivity. Thus many unions have traditionally fought the piece-rate system, and in recent years there have been determined efforts to secure contracts which provide employees with an overall sum per year whether or not they are forced to miss work because of sickness, accident or a lack of work; in other words, for the guaranteed annual wage.[1] To the extent that this movement has succeeded

[1] The 1967 Bargaining Convention of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) put the guaranteed annual wage concept in the following terms:

> "The objective is not to obligate any firm, regardless of the fate of its business, to retain all its present employees on the payroll for the rest of their lives. It is rather to immunize their incomes and the security of their families for a period of time against adverse effects flowing from fluctuations in the

thus far, or may succeed in the future, it has not caused anyone to suggest, so far as we are aware, that the cash wages which would be due under such a system of payment would not be entitled to the wage priority. Moreover, there are a number of methods for computing contributions to welfare and pension plans. As the instant case shows contributions may be based on time worked, and they may also be based on productivity, *see Lewis* v. *Benedict Coal Co.,* 361 U.S. 459 (1960), or set as a fraction of the hourly straight time cash wage.[2] We can see no reason of policy for treating the obligation incurred under any one of these systems differently from the others for the purposes of the Bankruptcy Act.

Nor is the inquiry advanced by stating that the workmen covered by a pension or welfare plan may not have a direct right to compel payments to that plan. For the definition of wages for the purposes of §64(a)(2) has always included severance pay, and in *Republic Steel Corp. v. Maddox,* 379 U. S. 650 (1965) this Court held that because of the arbitration provision in the applicable contract the employee in that case was required to process a grievance concerning

volume of business. In the case of the annual guarantee, upon which we shall insist, the immunity will be assured for a year at a time. As each new year begins, workers and their families will be able to look forward with confidence to a steady flow of income, week by week, for the next twelve months. The UAW member, whether employed in the plant, the office, the drafting room, or the laboratory, would, in effect, have an annual contract of employment.

"If actual employment was not forthcoming, income would nevertheless continue. We can be sure, however, that, when workers' incomes must be counted as overhead costs, corporate managements will concentrate their enormous ingenuity on the task of making the flow of work as nearly as possible as steady as the flow of worker incomes to which they will be obligated.'' BNA Collective Bargaining—Negotiations and Contracts, 12:27.

[2] For example, the 1966-1968 Agreement between The Associated General Contractors of America, Detroit Chapter, and the Metropolitan Executive Committee of Bricklayers of Detroit, provides that the Pension and Holiday components of the "Gross Wage" shall each be 6% of the "Base Wage", i.e. the hourly straight time cash wage.

severance pay allegedly due to him through the offices of his union and not directly in a court suit, *see also Vaca* v. *Sipes,* 386 U.S. 171 (1967). Thus, the fact that beneficiaries of a pension or welfare plan may have to look to the trustees of that plan in asserting their legal rights does not serve to distinguish those benefits from other components of the wage package.

In addition it is not accurate to say that workmen do not have a legal interest in a fund or trust which provides them with pension and welfare benefits. All the moneys which flow into such funds and trusts must be dedicated to the beneficial enjoyment of the covered employees under federal law, *see* pp. 9-10 *supra.* These laws point up the error of focusing on the fact that a trustee may have title to the funds for they make it perfectly plain that his interest is a nominal one. And as we noted above, the requirement of a separate fund or trust is the product of the desire to protect workers. Indeed to the extent tax considerations are irrelevant, and where the union is not interested in having a joint voice in the management of the funds, it is perfectly proper to have an agreement in which the employer agrees to pay pension and welfare benefits directly to the covered employees. And once again we can see no reason why the obligation to make such direct payments should be treated differently from the obligation to make payments to a fund or trust when that fund or trust must pay the money over to workmen.

It is, of course, true that most plans provide that "no person shall have any right, title or interest in or to the fund or any part thereof", *see* Section 9(c) of the Annuity Fund (R. 53). But this does not mean that the monies in question are not for the benefit of the covered employees. As the Petitioners' attorney explained, "This provision protects the Participant from creditors and other claimants, but does not prevent any Participant from obtaining the monies accumulated in his personal account" (R. 44-45). Moreover, such provisions also protect the plan from claims from participants who have not met whatever eligi-

bility requirements the plan may contain. These dual purposes are spelled out in the U. S. Steel—Steelworkers Plan in the following language (Sections 9.3 & 9.5, CCH Pension Plan Guide p. 31,.316, ¶ 43,779, ¶ 43,781):

> "No pension payable under this Agreement shall be subject in any way to alienation, sale, transfer, assignment, pledge, attachment, garnishment, execution, or encumbrance of any kind, and any attempt to accomplish the same shall be void.
>
> * * * *
>
> "No participant prior to his retirement under conditions of eligibility for pension benefits shall have any right or interest in or to any portion of any funds which may be paid into any pension trust or trusts heretofore or hereafter established for the purpose of pensions and no Participant or co-pensioner shall have any right to pension benefits except to the extent provided in this Agreement."

Thus these provisions protect the workmen covered by the particular plan and spell out the precise nature of his legal interest.

Finally, and to us this is the essence of the matter, the analysis of the majority opinion does not lead to any rational demarcation line susceptible of principled application by the lower courts. Despite the fact that in a realistic sense all components of the wage package agreed to in a collective agreement are inextricably intertwined the majority's analysis allows the wage priority to cash wages and to some forms of deferred compensation, such as vacation pay and severance pay, apparently without regard to whether or not these items are paid directly to the workmen or to a plan, *see Sulmeyer, supra,* 301, F.2d 768, while denying the preference to contributions due to pension and welfare plans.

The second portion of the majority's opinion focused on the purpose of the wage priority. It found that purpose to be to provide "the workmen a 'protective cushion' against economic displacement caused by their employer's bankruptcy" (359 U.S. at 33-34). Again, we must respectfully

submit that this portion of the opinion will not bear critical examination. For this invocation of Congressional intent is not based on the legislative history of the wage priority. As the Government candidly admitted in *Embassy Restaurant*, ". . . The Reports of Congressional Committees pertaining to the . . . Act . . . do not state the purpose of the priority provision . . ." (Gov. Br. No. 174, Oct. Term, 1958, 15). The cushion theory is thus a judicial creation and not a reflection of background material helpful in ascertaining the Congressional will. It is, moreover, a judicial creation that does not aid in the resolution of any other issue which may arise under §64(a)(2), and which merely restates the ultimate conclusion to the present problem reached by the majority. This point is illustrated by the lower court cases cited by the majority. The first, *Re Victory Apparel Mfg. Co.*, 154 F. Supp. 819, 822 (U.S. D.C. N.J., 1957) concerned the issue raised in *Embassy Restaurant*. The second, *Blessing* v. *Blanchard*, 223 F. 35 (9th Cir., 1915) dealt with the question of whether a general manager, and a superintendent of the shop, of an automobile dealer were within the term "workmen." In the course of the decision, the Court of Appeals stated (223 F. at 37):

> "Priority of payment was intended for the benefit only of those who are dependent upon their wages, and who, having lost their employment by bankruptcy, would be in need of such protection."

Initially, the question of the definition of workmen scarcely seems despositive on the definition of wages. In addition, the quoted portion of the opinion does not, in fact, provide support for the cushion theory. The point stressed in *Blessing* is that Congress evidently felt that the relatively lowly paid workman was entitled to special consideration. This suggests that those who are workmen for the purposes of §64(a)(2) should get the entire compensation due to them and not that they should receive only a portion of the overall sum for which they exchanged their labor. Thus since there is a lack of meaningful legislative history we submit that the definition of wages here should be one which accords with the normal legal definition

of that term in other ~~contents~~ Contexts and with the realities of collective bargaining. The definition which fits these criteria is the one proposed by the dissent, *see* pp. 4-8 *supra.*

Moreover, there can be little doubt that the protective cushion theory as applied in *Embassy Restaurant* does not make sense. As the Petitioners point out (Pet. Br. 17) wage claims are normally paid years after the bankruptcy has occurred. Thus, no matter how the amount of the priority is computed it is unlikely that the monies involved will help the employee weather the immediate consequences of the bankruptcy. In addition the satisfaction of a claim by a welfare or pension plan may be comparable in effect to the satisfaction of a claim for cash wages. For eventual satisfaction of the plan's claim enables it to afford the employees the continued protection of a life insurance or medical benefit policy in the interim and that may be as valuable as the eventual payment of cash wages due. Moreover, if the pension plan in question is a single employer plan it will probably be terminated at or soon after the bankruptcy. In such a situation the monies in the plan may be distributed or used to buy paid-up annuities depending on the funds available. And in any event, all the monies in the plan will go to the covered employees, *see* pp. 9-10 *supra.*[3] Certainly, where a plan is discontinued, the net effect on the workmen is essentially the same as that of a payment of cash wages or of a distribution from a vacation fund or severence pay fund, *cf. Sulmeyer, supra* 301 F.2d 768.

Finally, so far as we have been able to ascertain, there is no support for the majority's belief that the cushion theory is necessary to avoid overlapping claims for cash wages and monies due for pension and welfare benefits. Neither in the instant case nor in *Embassy Restaurant* were there claims for cash wages. Our discussions with labor lawyers familiar with this field indicate that such

---

[3] Provisions for terminating a pension trust are often detailed and elaborate. For an example see the provision in the General Motor—UAW Pension Plan set out at CCH Pension Plan Guide pp 31, 227-31, 229, ¶ 43, 653-¶ 43, 659.

claims are relatively rare. To us this is an additional reason for rejecting the cushion theory. For the restrictive meaning it attributes to the wage priority apparently goes far to expunge §64(a)(2) from the books despite the fact that "the history of the section is one of continuous Congressional expansion", 359 U.S. at 35 (dissenting opinion).

The final portion of the majority opinion is addressed to a consideration of *Shropshire, Woodliff & Co.* v. *Bush,* 204 U. S. 186 (1907) and *United States ex rel Sherman* v. *Carter,* 353 U. S. 210 (1957). The majority disposed of *Shropshire Woodliff* on the ground that in *Embassy Restaurant* "the obligation to make contributions, when incurred, was to the trustees, not to workmen" (359 U.S. at 34). But the payments in question there were not gifts and the trustees in question had performed no services for the employer and had no beneficial interest in the monies paid into the fund. It is, therefore, plain that the payments were made in exchange for the covered workmen's labor, and that the beneficial interest in the employer's contribution flowed to them. The debt was therefore one that was owed to them at its inception. This is the substance of the matter if not the form. Thus, as the dissenters recognized, *see* p. 8 *supra, Shropshire Woodliff* is exactly in point here. Next, the majority dealt with *Carter* by stating that that case did not deal with the meaning of wages (359 U.S. at 34). Acceptance of that assertion, however, does not dispose of *Carter* for that case did deal with the meaning of "sums justly *due* . . . persons furnishing labor", and it did hold that payments to a welfare fund covering workers are payments due to the persons who have furnished their labor. There would appear to be little doubt that *Embassy Restaurant* departs from the sound teachings of *Carter* in its construction of the phrase "*due* to workmen". This being so, *Carter,* at the least, is directly relevant to the construction of that phrase in §64(a) (2), and the majority advanced no reason for failing to follow it.

In conclusion we recognize that it could be argued that the position we have taken pays insufficient heed to *stare decises.* We believe however that such an argument is unsound in the circumstances of the instant case. For all that we urge this Court to do is to return to the sound principles of *Shropshire Woodliff, Carter* and the many cases which have given the term "wages" its proper and natural legal definition. In essence then, our argument has simply been an attempt to show that the majority in *Embassy Restaurant* gave insufficient deference to *stare decises* and that the reasons given by the majority in that case in support of its refusal to follow earlier lines of authority are unsound on both practical and legal grounds. And the excision of an unwise exception to earlier authority does not, we submit, offend *stare decises.* Moreover, the adoption of the dissenters' position in *Embassy Restaurant* is doubly justified here since it will not upset the reliance interest of any group. For we strongly doubt that the Government, the parties entitled to the lower priorities, or unsecured creditors have conducted their affairs with an eye to the extent of the wage priority.

## Conclusion

For the above stated reasons, as well as those set out in Petitioners' brief, the judgment of the court below should be reversed.

*Respectfully submitted,*

J. Albert Woll
*General Counsel, AFL-CIO*
Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N. W.
Washington, D. C. 20005
Thomas E. Harris
*Associate General Counsel, AFL-CIO*
815 Sixteenth Street, N.W.
Washington, D. C. 20006

January 1968